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In the Supreme Court of the United States

ALCAN ALUMINUM CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA;
STATE OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a company may be subjected to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and held jointly and severally liable for the entire cost of cleaning up a Superfund site, when its contributions to the site contained at most trace amounts of potentially harmful substances.

STATEMENT PURSUANT TO RULE 29.6

Alcan Aluminum Corporation is a wholly owned subsidiary of Alcan Inc. Alcan Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

This closely watched case presents questions of grave importance to American industry concerning the application of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The Second Circuit held that petitioner could be liable for the *entire* remaining cost of cleaning up two Superfund sites, even though the evidence suggested that petitioner's own contributions to the sites contained at most trace amounts of pollutants. To bring petitioner within CERCLA's sweep, the Second Circuit gave the triggering phrase "hazardous substance" an absurd definition. It then compounded its error by abandoning basic tort principles and refusing to apportion petitioner's liability. If allowed to stand, the Second Circuit's decision will work an unprecedented expansion of the already broad scope of CERCLA — a statute that has memorably been described as "a black hole that indiscriminately devours all who come near it." *Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust*, 32 F.3d 1364, 1366 (9th Cir. 1994) (Kozinski, J.) (internal quotation omitted). The Second Circuit's decision has enormous practical consequences, because it will either lead to selective prosecution or subject producers of common and unquestionably non-hazardous substances to potentially staggering Superfund liability. This Court should grant *certiorari* to review the Second Circuit's outlying decision.

OPINIONS BELOW

The Second Circuit's opinion is reported at 315 F.3d 179 and reprinted in the appendix ("App.") at 2a-17a. The unreported order denying the petition for rehearing *en banc* is reprinted at App. 1a. The district court's opinion is reported at 97 F. Supp. 2d 248 and reprinted at App. 18a-64a.

JURISDICTION

The Second Circuit entered judgment on January 7, 2003. Petitioner timely filed a petition for rehearing *en banc*, which

was denied on April 21, 2003. On June 12, 2003, Justice Ginsburg extended the time for filing this petition until September 18, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

In relevant part, section 107 of CERCLA, 42 U.S.C. § 9607, states as follows:

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section —

* * *

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances

* * *

[(4)] from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for —

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such

injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

STATEMENT OF THE CASE

1. This case arises from the efforts of respondents United States and the State of New York (hereafter "the government") to recover costs incurred in remedying environmental contamination at two waste-disposal sites in Oswego, New York. *See* App. 3a. The first (and by far the larger) site was operated by Pollution Abatement Services (PAS) from 1970 to 1977. *See id.* at 25a. The second site was operated by Fulton Terminals, Inc., over the same period, and was used for "overflow" waste from the PAS site. *See id.* at 33a.

During the period that the PAS and Fulton sites were in operation, petitioner Alcan Aluminum Corporation sent waste emulsion to those sites for disposal. *See id.* at 34a. That emulsion was used in the processing of aluminum at Alcan's Oswego plant. *See id.* at 23a-25a. The emulsion consisted of approximately 95% water and 5% mineral oil, but also carried with it small aluminum shavings containing the naturally occurring metals cadmium, chromium, copper, lead, and zinc. *See id.* at 35a, 48a. Alcan sent some 4.6 million gallons of emulsion to the PAS and Fulton sites. *See id.* at 4a, 5a.

2. In 1977, the PAS and Fulton sites were abandoned. *See id.* at 28a, 33a. Over the next ten years, the government spent over $12 million cleaning up the PAS site. *See id.* at 19a. In 1987, the government brought suit under CERCLA to recover response costs from 83 parties (including Alcan) that were potentially responsible for environmental problems at the PAS site. *See id.* at 18a. The government subsequently entered into a settlement with all of the potentially responsible parties except Alcan, under which those parties would pay approximately $9.1 million of the cleanup costs for the PAS site. *See id.* at 19a. Alcan refused to settle, on the ground that

the amount the government was seeking from Alcan ($3.2 million, or some 26% of the overall remediation costs) was excessive in light of the makeup of Alcan's waste emulsion. *See id.*

The government therefore proceeded with litigation against Alcan. *See id.*[1] In 1991, the district court initially entered summary judgment for the government against Alcan, rejecting Alcan's argument that its waste emulsion was not a "hazardous substance" under CERCLA because it contained less than the naturally occurring environmental background levels of cadmium, chromium, copper, lead, and zinc. *See* 755 F. Supp. 531, 536-39 (N.D.N.Y. 1991). But the Second Circuit reversed in relevant part, reasoning that Alcan could avoid CERCLA liability altogether if it could prove that "its pollutants contribute[d] no more than background contamination." 990 F.2d 711, 717 (2d Cir. 1993).

3. On remand before the district court, the government abandoned its prior theory of liability in light of the Second Circuit's decision. Instead, it claimed, for the first time in the litigation, that Alcan was liable because its waste emulsion contained nickel, a naturally occurring metal, and polychlorinated biphenyls (PCBs), a manmade substance. *See* App. 35a-45a. Although neither nickel nor PCBs were found in any tests of the emulsion from the PAS or Fulton sites, the district court nevertheless accepted the government's circumstantial evidence that nickel and PCBs were contained in that emulsion. *See id.*[2] And the court rejected Alcan's alternative argument that it should be exempt from liability

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[1] The government also pursued litigation against Alcan for the cleanup costs of the much smaller Fulton site. *See* App. 4a-5a. That litigation was subsequently consolidated with the litigation involving the PAS site. *See id.* at 5a.

[2] Alcan vigorously disputed this finding, but the Second Circuit affirmed it. *See id.* at 9a. The arguments presented in this petition do not turn on the validity of this finding.

because its emulsion did not contain *above-background* levels of PCBs, reasoning that PCBs were not naturally occurring substances and therefore did not have "background" levels in the environment. *See id.* at 49a-50a. The district court then proceeded to hold Alcan jointly and severally liable for the cleanup costs at the PAS and Fulton sites, rejecting Alcan's arguments that liability should be apportioned. *See id.* at 52a-55a. The district court subsequently entered final judgment in favor of the government for over $13.6 million. *See id.* at 5a.

The Second Circuit (Cardamone, J., joined by Straub and Katzmann, JJ.) affirmed. *See id.* at 2a-17a. Relying on its earlier decision, which stated that CERCLA does not impose quantitative requirements for liability, the court reasoned that the presence of *any* level of PCBs in Alcan's waste emulsion was sufficient to subject Alcan to CERCLA liability. *See id.* at 10a. The court then held that the "special exception" to liability it created in its earlier decision for wastes with below-background levels of "pollutants" was inapplicable to Alcan's emulsion because the emulsion contained PCBs, which are "man-made substances without natural background levels." *Id.* The court proceeded to reject Alcan's further argument that its liability should at least be apportioned, reasoning that (1) Alcan's emulsion contained at least some level of PCBs, and therefore was not "harmless," and (2) Alcan's emulsion could have "facilitated [the] transport" throughout the site of hazardous substances produced by *others*. *Id.* at 10a-13a. Finally, the court rejected Alcan's constitutional challenge to the retroactive application of CERCLA liability. *See id.* at 13a-17a.

The Second Circuit denied rehearing by the panel and rehearing *en banc*. *See id.* at 1a. This petition follows.

REASONS FOR GRANTING THE WRIT

THE SECOND CIRCUIT ERRED BY SUBJECTING A COMPANY TO CERCLA, AND BY HOLDING IT JOINTLY AND SEVERALLY LIABLE, WHEN ITS WASTE CONTAINED AT MOST TRACE AMOUNTS OF A POTENTIALLY HARMFUL SUBSTANCE.

A. The Second Circuit Erred By Concluding That A Company Could Be Subject To CERCLA Liability For Disposing Of Even A Non-Hazardous Substance Simply Because It Contains Trace Amounts Of A Potentially Harmful Substance.

The Second Circuit fundamentally erred in concluding that a generator could be subject to CERCLA liability for disposing of a waste product that contained *any* amount of a potentially harmful substance. If allowed to stand, that ruling will bring even producers of common and unquestionably non-hazardous substances within CERCLA's ambit. *Certiorari* is warranted to correct this bedrock error of interpretation.

As this Court has noted, CERCLA is "a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994). As this Court has also noted, however, CERCLA "is not a model of legislative draftsmanship." *Exxon Corp. v. Hunt*, 475 U.S. 355, 363 (1986). Lower courts have agreed, with one court noting that CERCLA was "passed in great haste" and is "riddled with inconsistencies and redundancies." *United States v. Alcan Aluminum Co.*, 964 F.2d 252, 258 n.5 (3d Cir. 1992). CERCLA's potential breadth is notorious: one recent example involved a reported threat to prosecute Girl Scouts for disposing of trash that included pizza boxes. *See Boehlert, Oxley Team Up To Offer Pared-Down Liability Relief Bill*, Superfund Week, Sept. 22, 2000, *available at* 2000 WL 23761144.

As is relevant here, CERCLA imposes liability on "any person who by contract, agreement, or otherwise arranged for disposal or treatment * * * of hazardous substances * * * at any facility from which there is a release, or a threatened release which causes the incurrence of response costs." 42 U.S.C. § 9607(a)(3)-(4). Although the statute itself does not speak to the issue, courts, including the court below, have universally held that liability under CERCLA is strict, with the result that liability can be imposed even on unwitting parties. *See, e.g.*, App. 6a. The statute, in turn, defines "hazardous substance" as, *inter alia*, "any element, compound, mixture, solution, or substance designated" as such by the EPA. 42 U.S.C. § 9601(14)(B). Among the substances designated as "hazardous" by the EPA is any wastewater that has "come into contact with process contaminants." 40 C.F.R. § 302.4. Although the EPA's regulations specify certain quantities of hazardous substances that must be contained in waste in order to trigger CERCLA's *reporting* requirements, *see id.*, they contain no analogous quantity requirements for purposes of triggering CERCLA's *liability* requirements, *see Alcan*, 964 F.2d at 259-61; *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1200 (2d Cir. 1992); *City of New York v. Exxon Corp.*, 766 F. Supp. 177, 181-83 (S.D.N.Y. 1991).

It would be wholly illogical, however, to define "hazardous substance" for liability purposes to include *any* product that contains even trace amounts of potentially harmful substances. A variety of unquestionably non-hazardous substances, from milk to rainwater, contain trace amounts of substances that, standing on their own, would be harmful. It is a matter of common sense that whether a substance is harmful depends on concentration and dose. *See, e.g.*, Alice M. Ottbani, *The Dose Makes The Poison* 6, 25 (2d ed. 1997) ("Every chemical has some set of exposure conditions in which it is toxic and, conversely, every chemical has some set of exposure conditions in which it is not toxic."). Interpreting "hazardous substance"

to include any product with even trace amounts of potentially harmful substances would effectively read the word "hazardous" out of CERCLA's liability provisions, in contravention of the basic canon of construction that statutes should not be read in such a way as to render critical terms meaningless. *See, e.g.*, *Morgan v. Illinois*, 504 U.S. 719, 738 (1992). Put another way, such an interpretation would extend strict liability under CERCLA to the producers of unquestionably non-hazardous substances. This Court has routinely "adjusted [even] unambiguous statutory commands to avoid absurd results." John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2389-91 (2003); *cf.* Antonin Scalia, *A Matter of Interpretation* 23 (1997) ("To be a textualist in good standing, one need not be too dull to perceive the broader social purposes that a statute is designed, or could be designed, to serve * * *.").

In its first decision in this case, the Second Circuit recognized "some force to [the] argument" that giving "hazardous substance" such a broad definition would lead to absurd results, and therefore carved out an exception for waste that contained lower than background levels of "pollutants": that is, levels below those that exist as a result of activities unrelated to the waste at the site. 990 F.2d at 716-17. That exception was designed to "shield from liability those entities that have contributed 'hazardous' substances — defined as such in the law — to a site but whose contribution — in the absence of EPA thresholds — did not exceed natural background levels." App. 10a. In its subsequent decision, however, the Second Circuit inexplicably limited its special exception to "hazardous substances [that] occur in the environment naturally." *Id.* In other words, the court held that a generator could *not* escape CERCLA liability if its waste contained trace amounts of *manmade* pollutants, on the ground that manmade pollutants do not have any "natural background levels." *Id.*

In so holding, the Second Circuit simply ignored the reality

that *manmade* pollutants exist in trace amounts in virtually any product, from milk to breakfast cereal, as well as in such "natural" locations as soil and rainwater. Indeed, the EPA has acknowledged this reality in its remediation policy, which does not normally require cleanup for below-background levels of potentially harmful substances, even manmade ones. *See* EPA, Office of Solid Waste and Emergency Response, Office of Emergency and Remedial Response, *Role of Background in the CERCLA Cleanup Program*, OSWER 9285.6-07P, at 7 (Apr. 26, 2002). In articulating that rule, the EPA expressly recognized that many manmade pollutants may have environmental background levels above zero. *See id.* at 3, 5, 7. In fact, with specific regard to PCBs, the Code of Federal Regulations makes clear that PCBs are "ubiquitous" in the environment. *See* 21 C.F.R. § 109.30(a). The Second Circuit's decision to treat manmade substances differently from naturally occurring ones cannot be justified. By holding that the trace quantities of PCBs in Alcan's emulsion transformed that emulsion into a "hazardous substance" subject to CERCLA liability, the Second Circuit effectively extended the statute's reach to innocuous substances such as milk and rainwater.

At least two other courts of appeals have rejected a similar approach in determining whether a substance is a "hazardous substance" covered by CERCLA. In *Massachusetts v. Blackstone Valley Electric Co.*, 67 F.3d 981 (1995), the First Circuit considered whether ferric ferrocyanide, a manmade substance, constituted a "cyanide" and therefore a "hazardous substance." *See id.* at 989. In so doing, it rejected the EPA's proffered test for determining whether a substance constituted a "cyanide," which turned on the "total cyanide" contained in it. *See id.* The court reasoned that such a test could lead to "nonsensical results" because many everyday substances, such as vitamin B-12, contained cyanide molecules. *Id.* at 989-90. The court concluded that such a test would be "untenably overinclusive" because it would sweep in substances that "no

one, including the EPA, would categorize * * * [as] within the meaning of * * * CERCLA." *Id.* at 990. Similarly, in *Licciardi v. Murphy Oil U.S.A., Inc.*, 111 F.3d 396 (1997), the Fifth Circuit suggested that a company could not be liable under CERCLA for disposing of *de minimis* amounts of hazardous substances. *See id.* at 399. At a minimum, the Second Circuit's decision is in tension with these decisions, and this Court's review is therefore merited.

If allowed to stand, the Second Circuit's decision will subject a wide range of unquestionably non-hazardous products to CERCLA liability. *Cf.* Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 39, 40 (1995) (noting that taking CERCLA's ban on "carcinogens" literally would lead to an "odd" result, because it would "mean[] not a single molecule of aflatoxin, red dye no. 2, or benzene, or for that matter, not the tiniest microscopic particle of pepper, spinach, or mushroom" could be discharged into the environment) (citations omitted). A number of food products, such as milk, unavoidably contain certain quantities of PCBs. *See* 21 C.F.R. § 109.30(a). And although the government may wrap itself in the mantle of prosecutorial discretion and claim that it would never prosecute a party for "dumping" food products, it cannot articulate a legitimate justification for treating food products that contain PCBs differently from waste that contains similar trace amounts of PCBs, but that (like food) is largely composed of innocuous substances. If allowed to stand, the Second Circuit's definition of "hazardous substance" will either result in unjustified selective prosecution or subject businesses to potentially staggering liability for disposing of non-hazardous products.

The Second Circuit's interpretation of "hazardous substance" sweeps far beyond what Congress could conceivably have intended. While some lower courts have properly confined CERCLA liability through judicially created exceptions, this case illustrates why the Court cannot always rely on lower

courts to do so. This Court's guidance is needed to make clear that liability under CERCLA is not boundless. *Certiorari* should be granted.

B. The Second Circuit Erred By Concluding That A Company Could Be Jointly And Severally Liable Under CERCLA Simply Because Its Product Could "Spread" Hazardous Materials Produced By Others.

Having erred in concluding that Alcan's emulsion was a "hazardous substance," the Second Circuit compounded its error by holding Alcan jointly and severally liable for the cleanup costs of the two sites (and thereby requiring Alcan to pay more than its fair share of those costs). This aspect of Second Circuit's decision, too, will have sweeping consequences. The logic of the Second Circuit's decision will allow courts to assess joint and several liability against companies that dispose of such innocuous substances as milk, simply because such substances could "spread" hazardous materials produced by others. For this reason, too, *certiorari* should be granted.

Although CERCLA itself does not specifically address the issue, courts have routinely held that joint and several liability may be imposed for CERCLA violations. *See, e.g., Dent v. Beazer Materials & Servs., Inc.*, 156 F.3d 523, 529 (4th Cir. 1998); *Alcan*, 964 F.2d at 268-69; *O'Neil v. Picillo*, 883 F.2d 176, 179 (1st Cir. 1989). In order to mitigate the potential unfairness of requiring a defendant to pay more than its fair share of cleanup costs, however, courts have allowed defendants, consistent with ordinary tort principles, to show that the harm they caused was divisible and therefore that liability should be apportioned. *See, e.g., Chem-Nuclear Sys., Inc. v. Bush*, 292 F.3d 254, 259-60 (D.C. Cir. 2002); *O'Neil*, 883 F.2d at 179; *United States v. Monsanto Co.*, 858 F.2d 160, 171-73 (4th Cir. 1988). Indeed, courts have suggested that aggressive application of the principle of divisibility is particularly necessary to counteract CERCLA's otherwise broad sweep.

See, e.g., Alcan, 964 F.2d at 261 n.13.

Although the Second Circuit paid lip service to the principle of divisibility, its broad "migratory potential" exception to the divisibility rule, if read literally, will swallow that rule altogether. The Second Circuit's fundamental error merits this Court's review.

The Second Circuit began by simply ignoring Alcan's evidence as to the relative amount of pollutants contained in Alcan's waste emulsion. The court reasoned that, "in light of the district court's conclusion that the waste emulsion contained PCBs, it is unreasonable for Alcan to continue to insist that its waste emulsion was harmless." App. 11a. To be sure, Alcan maintained in the court of appeals, as it had in the district court, that there was insufficient evidence to demonstrate that there were *any* PCBs in its waste emulsion (which, if proven, would have immunized Alcan from CERCLA liability altogether). In the alternative, however, Alcan also came forward with uncontested evidence showing that, even if PCBs *were* present in its emulsion, they were present only in minimal quantities.[3] Specifically, Alcan proffered evidence that any PCBs in its waste emulsion constituted no more than 0.01% of all of the known PCBs sent to the PAS site, and that those known PCBs, in turn, constituted only 0.24% of all the waste at the site. *See* C.A. App. 1196. This evidence provided a more than sufficient basis on which to apportion liability.

The Second Circuit then proceeded to suggest that "focusing individually on each constituent of [Alcan's] waste * * * does not provide an acceptable basis for establishing divisibility." App. 11a. The *only* "hazardous" component of Alcan's

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[3] Because the government introduced only circumstantial evidence that PCBs were present at all in Alcan's waste emulsion (such as evidence that PCBs were present in waste emulsion *subsequently* produced by Alcan), it never presented any evidence as to the *quantity* of PCBs in Alcan's waste emulsion.

emulsion that the Second Circuit recognized could give rise to CERCLA liability was PCBs. *See id.* at 10a.[4] There was no specific finding that the PCBs in Alcan's waste emulsion somehow interacted with any *other* hazardous component of Alcan's emulsion, nor that the PCBs interacted consequentially with hazardous substances produced by other generators. Instead, the Second Circuit, relying heavily on the district court's opinion, concluded that the presence of *non-hazardous* substances in Alcan's waste emulsion — namely, the water and mineral oil that constituted virtually all of the emulsion — barred Alcan from establishing divisibility, because those substances could "facilitate[] [the] transport" of *hazardous* substances produced by *other* generators, and therefore "contributed to the breadth of contamination at both PAS and Fulton." *Id.* at 12a-13a (internal quotation omitted). As the district court put it, "[Alcan's] emulsion had a mobilizing effect on other hazardous wastes." *Id.* at 53a.

This startling determination threatens to blow the limits off CERCLA liability entirely. As a threshold matter, the mere addition of waste that itself has a low concentration of hazardous material, even if it has the effect of spreading *other* hazardous substances already at a site, is not necessarily harmful. Indeed, such waste may actually have the beneficial effect of *diluting* the concentration of those substances. Even leaving that aside, however, the Second Circuit's holding that a party should be held jointly and severally liable based on the "migratory capacity" of the *non-hazardous* component of its waste, even where the *hazardous* component is admittedly relatively small, is both illogical and, to the best of our knowledge, unprecedented. Under the Second Circuit's

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[4] Although the district court also concluded, over Alcan's objection, that nickel was present in Alcan's waste emulsion, *see* App. 35a-36a, it did not conclude that nickel was present in greater than background levels, and the Second Circuit therefore did not rely on the presence of nickel in refusing to apportion Alcan's liability, *see id.* at 10a-13a.

reasoning, even if Alcan's waste emulsion had consisted *solely* of water and mineral oil — assuming, for the moment, that such a harmless emulsion could constitute a "hazardous substance" under CERCLA — Alcan could be held *entirely* liable for the cleanup costs for the two sites, simply because that *entirely* non-hazardous emulsion could have absorbed hazardous substances dumped by others and spread it to other locations. In effect, therefore, the Second Circuit used the presence of a minimal amount of PCBs in Alcan's waste (which qualified it as a "hazardous substance") as a bootstrap to subject Alcan to liability for *all* of the PCBs, and indeed all of the hazardous substances, dumped at the two sites (with Alcan entitled only to the limited offset of the disproportionately low share paid by the settling defendants).

The Second Circuit's rule would have the perverse effect of subjecting to joint and several liability any company whose "waste" happens to meet the court's capacious definition of "hazardous substance."[5] This unjustifiable approach has the potential further to broaden CERCLA's sweep, and to threaten businesses with the dramatic prospect of disproportionate and burdensome liability for the cleanup costs of Superfund sites. *Certiorari* is warranted in order to provide guidance to the lower courts on these vitally important issues.

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[5] As we have noted, milk contains PCBs and therefore would qualify as a "hazardous substance" under the Second Circuit's definition. *See* 21 C.F.R. § 109.30(a). Remarkably, moreover, because milk has similar solubility qualities to Alcan's waste emulsion, *see* C.A. App. 1057, the mere disposal of milk could give rise to joint and several liability under the Second Circuit's rule.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for *certiorari*.

Respectfully submitted,

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